

Spring 2000

SPANDAU REVISITED: THE QUESTION OF DETENTION FOR INTERNATIONAL WAR CRIMES

Mary Margaret Penrose

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_human_rights



Part of the [Law Commons](#)

Recommended Citation

Penrose, Mary Margaret (2000) "SPANDAU REVISITED: THE QUESTION OF DETENTION FOR INTERNATIONAL WAR CRIMES," *NYLS Journal of Human Rights*: Vol. 16 : Iss. 2 , Article 3.
Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol16/iss2/3

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

ARTICLES

Spandau Revisited: The Question of Detention for International War Crimes

Mary Margaret Penrose*¹

*When we evaluate the impact of World War II war crimes trials on reducing future atrocities, we must admit failure.*²

INTRODUCTION

Drazen Erdemovic. The name may be unfamiliar to many outside the former Yugoslavia. The name will surely be unknown by most people outside the international community and those committed to the universal protection of human rights through criminal prosecution. Drazen Erdemovic is a confessed killer. Drazen Erdemovic has confessed to killing somewhere between seventy and one hundred unarmed Muslims in a mass execution as a member of the Bosnian Serb army in July 1995.³ In this regard, he is the first convicted defendant⁴ to stem from the International Criminal Tribunal for the former Yugoslavia (ICTY) established by the United Nations in 1993.⁵ He is also the first ICTY defendant to have appealed his

* J.D., Pepperdine University School of Law; L.L.M., Notre Dame Law School, Center for Civil and Human Rights; S.J.D. Candidate, Notre Dame Law School, Center for Civil and Human Rights.

¹ In the Spring of 1999, while a student at the University of Notre Dame, I had the opportunity to meet former Nuremberg Prosecutor Benjamin Ferencz. He gave me an assignment that day: "Please save the world." Although it is highly unlikely that I will ever come close to completing his assignment or effectuating his request, this article is a step in that direction. Accordingly, this article is respectfully dedicated to Professor Benjamin Ferencz and his motivating spirit.

² JOHN L. GINN, SUGAMO PRISON, TOKYO 241 (1992).

³ Prosecutor v. Erdemovic, Sentencing Judgment, ICTY Case No. IT-96-22-T, para. 5, Mar. 5 1998, available at U.N. website (visited Jan. 26, 2000) <<http://www.un.org/icty/erdemovic/trials/judgment/erd-ts980305e.htm>> [hereinafter Second Judgment].

⁴ See *U.N. War Crimes Court Hands Down First Sentence*, AGENCE FRANCE PRESS, Nov. 29, 1996; see also *War Criminal Jailed Over Massacre*, LONDON EVENING STANDARD, Nov. 29, 1996, at 17 (reporting that Erdemovic is the first individual to be sentenced by an international war crimes tribunal since the Nuremberg and Tokyo trials).

⁵ See generally Statute of the International Criminal Tribunal for the

conviction and to have received a final judgment and sentence from the Tribunal.⁶

Beyond his gruesome biography developed at Srebrenica, Mr. Erdemovic will also be remembered for his role as a catalyst. On March 5, 1998, the ICTY sentenced Drazen Erdemovic to five years in prison for committing war crimes in the former Yugoslavia.⁷ This judgment was truly monumental as the ICTY would have to consider

Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute]. The ICTY Statute was attached to Security Resolution 827 as an addendum.

⁶ Currently, there are six individuals whose ICTY convictions are pending before the Appeals Chamber at The Hague. See generally United Nations website [U.N. website], *International Criminal Tribunal for the Former Yugoslavia* (visited Feb. 14, 2000) <<http://www.un.org/icty/glance/fact.htm>> (illustrating the recent conviction and attendant forty year sentence of Goran Jelasic will undoubtedly be challenged by the defendant on appeal as this is the harshest sentence issued to date. See Press Release 454-e, *Goran Jelasic Sentenced to 40 Years Imprisonment* [sic] for Crimes Against Humanity and War Crimes, Dec. 14, 1999, available at U.N. website (visited Jan. 26, 2000) <<http://www.un.org/icty/pressreal/p454-e.htm>> (conveying the most recent conviction was pronounced on 14 December 1999, against Goran Jelasic). Mr. Jelasic was found guilty on fifteen counts of crimes against humanity and sixteen counts of violations of the laws and customs of war and has been sentenced to serve forty years imprisonment. *Id.* In addition, Dusko Tadic has been sentenced to serve concurrent sentences ranging from twenty-five to six years for his conviction on multiple counts. The most recent ruling rendered in his case is the Trial Chamber's Sentencing Judgment following the Prosecutor's appeal. This judgment was rendered on November 11, 1999. See Press Release 447-e, *Tadic Sentenced to 25 Years Imprisonment*, Nov. 11, 1999, available at U.N. website (visited Feb. 15, 2000) <<http://www.un.org/icty/pressreal/p447-e.htm>>. Also awaiting decision on appeal are Zdravko Mucic (sentenced to serve seven years), Hazim Delic (sentenced to serve twenty years), and Esad Landzo (sentenced to serve fifteen years), each of whom were found guilty of violations in the "Celebici" case on October 15, 1998; Anto Furundzija, sentenced to serve ten years on December 10, 1998; and, Zlatko Aleksovski (sentenced to serve two years), who has been released by the Tribunal due to credit for time served. See generally Index of /icty/glance (visited Feb. 15, 2000) <<http://www.un.org/icty/glance>>. Eventually, each of these individuals will need a permanent prison facility or institution in which to serve their respective sentences.

⁷ See Second Judgment, *supra* note 3, at para. 23. This sentence follows an appeal invalidating the Trial Chamber's prior pronouncement that Mr. Erdemovic should serve ten years for his crime. See generally Prosecutor v. Erdemovic, Sentencing Judgement, 1996, ICTY Case No. IT-96-22-T, Nov. 29, 1996, available at U.N. website (visited Feb. 15, 2000) <<http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj961129e.htm>> [hereinafter First Judgment].

for the first time since its inception precisely *where* it would send a prisoner to serve his final sentence.⁸ Such decision had not been contemplated by an international tribunal since the vanquished defendants of World War II were housed in the Spandau and Sugamo prison facilities located in the home countries of each of the World War II defendants.⁹ In fact, at the time Drazen Erdemovic was sentenced, only two countries (Italy and Finland)¹⁰ had reached agreement with the Tribunal enabling ICTY prisoners to be incarcerated outside the detention facilities of the Hague.¹¹

⁸ The selected place for incarceration does not appear in Erdemovic's Sentencing Judgment. *See generally* Second Judgment, *supra* note 3.

⁹ Unlike the World War II Tribunals at Nuremberg and Tokyo, each of which were conducted following the War in the occupied territories of the victorious Allies, the seat of the ICTY is The Hague, Netherlands — far outside the continuing Yugoslavian conflict. Further, the ICTY is not permitted to place convicted defendants in prisons located in the territory of the former Yugoslavia. The language of Article 27 of the ICTY Statute implicitly precludes imprisonment in any former Yugoslavian territory. To the extent that any ambiguity exists, however, the Secretary-General of the United Nations confirmed that Yugoslavian prisons were unacceptable given the nature of the crimes in question and the international character of the Tribunal. *See* JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 116 (1997). The Tribunal has also expressed reservations about sentencing any ICTY defendant to a Yugoslavian facility. *See* First Judgment, *supra* note 7, at paragraph 70 (unequivocally indicating that “the Trial Chamber shares the view of the Secretary-General that [ICTY] sentences should be served outside the territory of the former Yugoslavia . . . because of the situation prevailing in that region, it would not be possible to ensure the security of the convicted person or the full respect of a decision of the International Tribunal in that regard.”).

¹⁰ *See* Press Release 382, *infra* note 12.

¹¹ The 1997 Official Report of the ICTY indicates that ten States have “indicated their willingness” to enforce sentences of the Tribunal. These States include Bosnia and Herzegovina, Croatia, Denmark, Finland, Germany, the Islamic Republic of Iran, Italy, Norway, Pakistan and Sweden. In addition to those offering support, ten other States have indicated that they are *unable* to accept prisoners from the ICTY. The unavailable States are the Bahamas, Belarus, Belize, Burkina Faso, Ecuador, France, Liechtenstein, Malaysia, Poland and Slovenia. *See* Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/1997/729, Sept. 18, 1997, at 27, U.N. website (visited Feb. 14, 2000) <<http://www.un.org/icty/rapport4-e.htm>>. Several States, however, have expressed their agreement to receive prisoners only with reservations. *See War Criminal Jailed Over Massacre, supra* note 4, at 17 (indicating that Denmark, Germany, the Netherlands, Spain and Sweden have all agreed to take ICTY prisoners “with reservations”). Finland has stated that it will not accept political leaders or high-ranking officials who might require

Thereafter, Norway and Sweden, in April 1998, and February 1999, respectively,¹² joined Italy and Finland as possible hosts for ICTY prisoners.¹³

In the pages that follow, the question of detention as it relates to the ICTY, the International Criminal Tribunal for Rwanda ("ICTR")¹⁴ and the forthcoming International Criminal Court ("ICC")¹⁵ will be addressed. As these tribunals continue to hand down guilty verdicts and accompanying sentences, the issue of detention can no longer be avoided or delayed. To date, the ICTY has issued twenty-five public indictments implicating sixty-six individual defendants,¹⁶ supervised the arrest and detention of forty individuals,¹⁷ and convicted seven men with potential sentences ranging from two and one half to forty years.¹⁸ Likewise, twenty-eight public

extraordinary security. See *Finland Ready to Receive Yugoslavia War Criminals*, REUTERS WORLD SERVICE, May 9, 1997. Sweden has indicated that it will only accept ICTY prisoners who are Swedish citizens or long-standing Swedish residents. See *Finnish Prisoners to Take in Five Convicted War Criminals*, AGENCE FRANCE PRESS, April 24, 1996.

¹² See generally Press Release 382, *Sweden to Become the Fourth State to Sign an Agreement on the Enforcement of Sentences*, Feb. 18, 1999, available at U.N. website (visited Feb. 15, 2000) <<http://www.un.org/icty/presseal/p382-e.htm>>.

¹³ *Id.* Italy was the first State to reach agreement with the Tribunal regarding the enforcement of sentences on February 6, 1997. Finland followed Italy by proffering its prison facilities to the ICTY on May 7, 1997. *Id.*

¹⁴ See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994, Sess., Nov. 8, 1994, U.N. Doc. S/RES/955, reprinted in 33 I.L.M. 1598, 1612 [hereinafter ICTR Statute]. The ICTR Statute was attached to Security Resolution 955 as an addendum.

¹⁵ See Rome Statute on the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

¹⁶ See U.N. website (visited Jan. 26, 2000) <<http://www.un.org/icty/glance/list3.htm>> [hereinafter list3].

¹⁷ *Id.*

¹⁸ As stated above, the case of Drazen Erdemovic remains the only final judgment issued by the ICTY in nearly seven years of operation. He was sentenced by the Court to five years in prison on 5 March 1998, following a successful appeal challenging his prior sentence and conviction. See Second Judgment, *supra* note 3. Most recently, Goran Jelusic received a forty year sentence that he will likely challenge on appeal. See Press Release 454-e, *supra* note 6. Also, Dusko Tadic received an increase in sentence from twenty years imprisonment to twenty-five years imprisonment on 11

indictments have been issued by the ICTR against forty-eight individuals.¹⁹ As of December, 1999, thirty-eight individuals remain in ICTR custody at the temporary United Nations detention facility in the Arusha prison.²⁰ And, the ICTR has issued guilty verdicts against five separate defendants with pronounced sentences ranging from fifteen years to life imprisonment.²¹

Through sheer necessity — the impetus having been provided by Erdemovic — the international community that has maintained and supported these war crimes Tribunals must now come together to determine where these individuals will serve their respective sentences once convicted. The legitimacy of the ICTY and ICTR requires that the issue of detention be as fully considered and as fairly implemented as every other procedural and evidentiary issue previously addressed by these Tribunals. Their much-anticipated successor institution, the ICC, will be waiting, watching and looking for guidance. Their predecessors, the Nuremberg²² and Tokyo Trials²³ are but a distant memory — still plaguing the international community with claims of “victors’ justice,”²⁴ imperfect sentencing and partisan

November 1997, following a full trial and appeal by the Prosecutor. *Id.* Mr. Tadic has appealed this increase in sentence. Because his case remains pending on appeal, Mr. Tadic has not been transferred from the ICTY’s holding facility at the Scheveningen prison at The Hague. *Id.* Further, because the remaining convicted defendants have cases pending on appeal, they too remain at the ICTY holding facility at The Hague. *Id.* See list3 *supra* note 16.

¹⁹ ICTR website (visited Feb. 15, 2000) <<http://www.ictr.org/ENGLISH/factsheets/factsee.htm>>.

²⁰ *Id.* One additional ICTR defendant remains incarcerated by United States government officials in Texas.

²¹ *Id.* In stark contrast to the ICTY sentencing practices, three ICTR defendants have thus far been condemned to life in prison. These individuals are Jean-Paul Akayesu (convicted of genocide), Jean Kambanda (pled guilty to genocide), and Clement Kayishema (convicted of genocide). The two remaining sentences are against Obed Ruzindana (sentenced to twenty-five years in prison for genocide) and Omar Serushago (sentenced to fifteen years for crimes against humanity). Each of these convictions and resulting sentences remains pending on appeal.

²² See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, GERMANY (14 NOV. 1945–1 OCT. 1946), 10 (1947).

²³ See generally THE TOKYO WAR CRIMES TRIAL (R. John Pritchard et al. eds., 1981) (collecting many of the documents from the Tokyo Trials which occurred between April 24, 1946 and November 12, 1948).

²⁴ See VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE

politics.²⁵

The time has come for detention decisions in international criminal law. We are on the verge of a new millennium. Finally, the world community has concrete plans for a permanent international criminal court. And yet, we have no idea, no plans and certainly no existing blueprint for precisely where we intend to incarcerate the individuals that we, as an international community, convict. Drazen Erdemovic, a name unfortunately relegated to historic significance, has forced the issue.

I. THE ESTABLISHMENT OF THE ICTY AND ICTR

On February 22, 1993, the Security Council of the United Nations decided that the establishment of an international tribunal was necessary "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."²⁶ This Resolution, commonly referred to as Resolution 808, provided the Secretary-General no more than sixty days to present the Security Council with "a report on all aspects of this matter, including specific proposals."²⁷

Thereafter, on May 25, 1993, the Security Council adopted a second Resolution, Resolution 827, providing specific proposals for the establishment of the ICTY.²⁸ Acting under Chapter VII of the

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 332 (1994) (stating that "[a] primary criticism of Nuremberg was that it amounted to victors' justice since the tribunal was composed exclusively of prosecutors and judges from the victorious countries and the defendants were limited to Germans, even though the allied personnel also committed serious violations of humanitarian law during the war. The International Tribunal, in contrast, was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of States.").

²⁵ See THE TOKYO WAR CRIMES TRIAL, *supra* note 23, at 1. "Like its Nuremberg counterpart, the Tokyo War Crimes Trial was a product of the highly-charged emotional atmosphere of its time . . . [t]he Trial itself has been a subject for considerable controversy. The procedure, rulings and findings of the Court have been called into question by later generations." *Id.*

²⁶ See U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (Feb. 22, 1993).

²⁷ *Id.*

²⁸ See U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993).

Charter of the United Nations in both instances, the Security Council officially called upon all States to "co-operate fully with [these] International Tribunal[s] and [their] organs in accordance with the present resolution and the Statute of the International Tribunal."²⁹ This mandate further required all States to "take any measures necessary under their domestic law to implement the proviso of the present resolution and the Statute."³⁰

Approximately eighteen months later, the Security Council was again moved to formally respond to international war crimes and crimes against humanity.³¹ This time, the impetus was a rapid and decimating genocidal campaign where nearly one million Rwandan citizens perished in a span of one hundred days.³² The purpose of this second *ad hoc* body was also to restore peace and order to the country through criminal prosecutions.³³

With the development of the ICTR, the international community would witness the creation of the first two international war crimes Tribunals since Nuremberg and Tokyo. These modern creations, however, have the enviable task of importing justice back to the war-torn countries they purportedly represent as neither Tribunal is located within the territory where the conflict and crimes

²⁹ *Id.*

³⁰ *Id.*

³¹ See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 353 (1997).

³² See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

Decimation means the killing of every tenth person in a population and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda. Although the killing was low-tech — performed largely by machete — it was carried out at dazzling speed: of an original population of about seven and a half million, at least eight hundred thousand people were killed in just a hundred days. Rwandans often speak of a million deaths, and they may be right. The dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.

Id. at unnumbered page prefacing p. 5.

³³ See generally Morris, *supra* note 31.

occurred.³⁴ Instead, the international community has agreed “to cooperate” from a comfortable distance by conveying a message to both venues that war crimes remain intolerable and will expose the perpetrators to criminal sanctions.

This issue of cooperation becomes crucial when considering the question of detention. For with the issuance of these two Resolutions, the world community would move ever closer to the realization of a permanent system of enforceable international criminal law. These new judicial institutions, however, differ from their predecessor bodies at Nuremberg and Tokyo in several important respects.

First, because the ICTY was established prior to the cessation of hostilities in the former Yugoslavia and under the guise of Chapter VII of the United Nations Charter, Articles 39 and 41, the tribunal is considered a vehicle to help “maintain and re-establish international peace and security.”³⁵ Similarly, although the ICTR was established after the Rwandan genocide was complete, many of the individuals responsible for these crimes have fled to neighboring countries where the international community has no physical presence or juridical personality.³⁶ Because both institutions originated from the Security Council under Chapter VII, they should be immune from the many

³⁴ See generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997). Professor Bassiouni challenges that “Arusha (Tanzania) is not the ideal place for locating the [ICTR], since there too, the U.N. had to build the Tribunal’s infrastructure from scratch under trying circumstances.” *Id.* at 49.

³⁵ See KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA 6 (1996). “In affirming that the situation generated by the virtually systematic breaches of international humanitarian law in former Yugoslavia constituted a threat to international peace and security under the terms of Article 39 of Chapter VII, the Security Council provided itself with the means to apply Article 41 of the same chapter. This article enables it, in such a situation, to take adequate measures not involving the use of armed force. The measures actually quoted are of an economic nature (complete or partial rupture of economic ties and rail, sea and air links, etc.), but this is not exclusively the case because Article 41 also envisages the breaking of diplomatic relations. Although the creation of a criminal jurisdiction may seem very far removed from such measures, the formulation of the second sentence in Article 41 “these may include” clearly shows the exemplary and non-restrictive nature of the list.” *Id.*

³⁶ See generally Mary M. Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. J. INT’L L. & POL’Y (1999).

criticisms levied against the World War II Tribunals.³⁷ In fact, two scholars have suggested that this unique creation provides the ICTY and ICTR “with both eminently international and political credibility.”³⁸

The second main distinction between the modern international Tribunals and the World War II bodies is that the range of penalties set forth in both the ICTY and ICTR Statutes explicitly preclude the imposition of the death penalty.³⁹ The ICC has likewise adopted the modern approach and also limits punishment to terms of imprisonment and the possible imposition of fines.⁴⁰ The abolition of the death penalty, by necessity, mandates that a system for detention be established to house individuals convicted of international crimes.⁴¹

³⁷ See MORRIS & SCHARF, *supra* note 24, at 332; MICHAEL P. SCHARF, BALKAN JUSTICE 11 (1997) (stating that “[t]hese criticisms are not without foundation. It was true, for example, that only victorious states were represented on the Nuremberg Tribunal. Many commentators have criticized the Allies’ failure to appoint a judge from a neutral country or from Germany. . . . In addition, the states that tried the Nuremberg defendants were guilty of many of the same crimes for which they convicted and hung their former adversaries.”); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 201 (1996). “The Tribunal, then, was not established by a military victor to judge the defeated party’s or parties’ nationals. Instead, acting on behalf of the world community, the [Security Council] established the Tribunal to judge all parties to the conflict who committed violations of well-established international criminal law.” *Id.*

³⁸ See LESCURE & TRINTIGNAC, *supra* note 35, at 3-4 (stating that “[i]n the case of the Tribunal for former Yugoslavia, the community of nations, through the Security Council, the main restraining body of the United Nations Organization (UNO) was behind its creation, which provides it with both eminently international and political credentials. This international dimension will certainly enable the Tribunal and its members not to be exposed to the criticism expressed concerning the Nuremberg Tribunal according to which the justice then rendered was that of the victors”).

³⁹ The death penalty was a regularly exercised option both at Nuremberg and Tokyo. Of the twenty-five men convicted at Tokyo, seven received the death penalty. RICHARD H. MINEAR, VICTORS’ JUSTICE: THE TOKYO WAR CRIMES TRIAL 31 (1971). Likewise, eleven defendants at Nuremberg were sentenced to death by hanging. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 598-99 (1992). Ironically, the main complaint by defendants regarding the death penalty seemed to be the manner of death imposed — hanging as opposed to the utilization of a firing squad. As the Nuremberg defendants challenged, a soldier was entitled to the more honorable death by firing squad. *Id.* at 601-02.

⁴⁰ See *infra* note 47 (setting forth the full text of the Rome Statute’s Article 77, which delimits the possible range of penalty for individuals convicted by the ICC).

⁴¹ Because the victors during World War II still occupied the territories

One of the more unique aspects of the ICTY, which differs both from the World War II tribunals and from its sister court, the ICTR, is that the ICTY statute seemingly prohibits persons convicted by the Court from being incarcerated within the former Balkan States.⁴² This nuance will require greater cooperation from the community of nations and, likewise, greater care and creativity in addressing the detention dilemma. Spandau⁴³ and Sugamo⁴⁴ are merely historical relics reminiscent of an earlier approach to international criminal law.

wherein the criminal proceedings were conducted, they were able to find a single prison facility for each of the two Tribunals in which to detain prisoners. The Spandau prison facility, which was situated in the British-controlled sector of West Berlin, was the sole place of detention for individual defendants convicted by the Nuremberg Trial and sentenced to prison sentence. TAYLOR, *supra* note 39, at 615. The Tokyo prisoners were detained in the Sugamo prison facility located just outside the downtown area of Tokyo. GINN, *supra* note 2, at 1-11.

⁴² Article 27 of the ICTY Statute reads in pertinent part as follows:

Enforcement of Sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated their willingness accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

ICTY Statute, *supra* note 5, at art. 27. See also LESCURE & TRINTIGNAC, *supra* note 35, at 76 (stating that "[t]he States of [the] former Yugoslavia would not appear to be among those liable to be asked to carry out the sentences").

⁴³ See TAYLOR, *supra* note 39, at 615. When the ninety-three year-old Rudolf Hess committed suicide in 1987, Spandau's final resident completed his life sentence. Immediately following the death of Hess, the prison was destroyed "so that it would not become a historical attraction." *Id.* at 618.

⁴⁴ See GINN, *supra* note 2, at 1.

Sugamo Prison no longer exists except in official American and Japanese records, and in the memories of those who served time there as prisoners or guards. In its place now is a very expensive housing and shopping complex named Sunshine City, the location of the tallest building in Japan. In one corner of the complex is a small park where a large stone marks the location of the prison's gallows. A message in Japanese reads "pray for eternal peace."

Id.

II. ICTY STATUTE AND RULES REGARDING DETENTION

Article 24 of the ICTY Statute provides in pertinent part that “[t]he penalty imposed by the Trial Chamber *shall be limited to imprisonment*. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”⁴⁵ Article 23 of the ICTR Statute essentially mirrors the language of its sister institution in providing that “[t]he penalty imposed shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.”⁴⁶ This limitation regarding punishment clearly distinguishes the modern *ad hoc* Tribunals and the forthcoming ICC⁴⁷ from the previous juridical bodies at Nuremberg and Tokyo.

A combined total of eighteen death sentences were

⁴⁵ See ICTY Statute, *supra* note 5, at art. 24 (emphasis added).

⁴⁶ See ICTR Statute, *supra* note 14, at art. 23(1).

⁴⁷ *Id.* Article 77 of the Rome Statue provides in pertinent part as follows:

Applicable Penalties

1. Subject to article 110, the Court may impose on of the following penalties on a person convicted of a crime under article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. *In addition to imprisonment*, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of the bona fide third parties.

Rome Statue, *supra* note 15, at Part 7, art. 77 (emphasis added). It is apparent that the modern approach to international criminal law limits the possible range of penalty to terms of imprisonment. While this approach to criminal justice is severely limited, and indeed limiting, this article does not provide sufficient space to properly address this issue. It is sufficient for the purposes of this piece that readers understand the connection between penalties of imprisonment and the consequential need for places of confinement.

pronounced against the Major War Criminals following World War II. Seven of the Major Tokyo War Criminals received the death penalty⁴⁸ including: Kenji Doihara, Koki Hirota, Seishiro Itagaki, Heitaro Kimura, Iwane Matsui, Akira Muto, and Hideki Tojo.⁴⁹ The Nuremberg Tribunal more generously resorted to capital punishment as twelve of the twenty-two Major Nuremberg War Criminals were sentenced to hang.⁵⁰ However, only eleven of the Nuremberg death sentences were carried out as Martin Bormann, who was tried *in absentia* and found guilty, was never captured by the Tribunal and thereby avoided the fate suffered by his compatriots.⁵¹ The eleven Nuremberg defendants executed by the Tribunal were Hermann Goring, Joachim von Ribbentrop, Wilhelm Keitel, Alfred Jodl, Alfred Rosenberg, Wilhelm Frick, Arthur Seyss-Inquart, Fritz Sauckel, Ernst Kaltenbrunner, Hans Frank, and Julius Streicher.⁵²

Despite the option of the death penalty at each of the World War II Tribunals, there were still several prison sentences handed down at both Nuremberg and Tokyo. The Tokyo tribunal issued eighteen prison sentences against the Major War Criminals, sixteen of which were originally set as life sentences.⁵³ In contrast, only seven of the Major Nuremberg War Criminals received prison sentences in lieu of death.⁵⁴ Not a single Tokyo defendant imprisoned at Sugamo actually served his life sentence “unless he died of natural causes within a very few years. They were all paroled and pardoned by

⁴⁸ See GINN, *supra* note 2, at 122.

⁴⁹ *Id.* at 136-37.

⁵⁰ See MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-1946: A DOCUMENTARY HISTORY* 261 (1997).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See MINEAR, *supra* note 39, at 172 (reporting that “[s]ix of these men died in prison. The other twelve served only part of their sentences”). Life sentences were pronounced against the following individuals: Sadao Araki, Kingoro Hashimoto, Shunroku Hata, Kiichiro Hiranuma, Naoki Hoshino, Okinori Kaya, Koichi Kido, Kuniaki Koiso, Jiro Minami, Takasumi Oka, Hiroshi Oshima, Kenro Sato, Shigetaro Shimada, Toshio Shiratori, Teiichi Suzuki and Yoshijiro Umenzu. GINN, *supra*, note 2, at 136-37. One of the Major War Criminals, Shigenori Togo, received a sentence of twenty years imprisonment. *Id.* And, the lightest sentence of seven years was issued against Mamoru Shigemitsu. *Id.*

⁵⁴ See MARRUS, *supra* note 50, at 261.

1958.”⁵⁵

Similarly, several of the Nuremberg defendants sentenced to the Spandau facility⁵⁶ were released prior to the expiration of their respective sentences.⁵⁷ The sentencing and detention precedents established at Nuremberg and Tokyo, however, are of limited assistance to the modern endeavors.⁵⁸ Unlike the current Tribunals, the prisoners of Nuremberg and Tokyo were each sentenced contemporaneously with their compatriots and served their entire sentences with one another in a single detention facility.⁵⁹ In addition, the enforcement of Nuremberg sentences was overseen by the victorious Allies on a rotating cycle,⁶⁰ while the United States Army was put in charge of the Sugamo prison facility.⁶¹ Once the sentences were issued, the Tribunals were no longer maintained to oversee to the

⁵⁵ See GINN, *supra* note 2, at 242.

⁵⁶ In contrast to the sentencing practices at Tokyo, only three of the Major War Criminals at Nuremberg were sentenced to life in prison: Erich Raeder, Walther Funk and Rudolf Hess. See MARRUS, *supra* note 50, at 261. In addition, two defendants received sentences of twenty years: Albert Speer and Baldur von Schirach. See *id.* One defendant, Constantin von Neurath, received a sentence of fifteen years imprisonment while another, Karl Donitz, was sentenced to serve ten years. *Id.* Unlike the Major War Criminals at Tokyo, where all defendants were found guilty on at least one count, three of the Major War Criminals at Nuremberg were acquitted on all charges. The acquitted individuals were Hans Fritzsche, Franz von Papen and Hjalmar Schacht. *Id.*

⁵⁷ See generally TAYLOR, *supra* note 39, at 616-18. See MARRUS, *supra* note 50, at 258-59 (reporting that Rudolf Hess, one of the few defendants who served his full life sentence, committed suicide in the Spandau prison facility at the age of 93).

⁵⁸ A similar observation has been made regarding the two ad hoc Tribunals. See Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123 (1997). “The Yugoslavian and the Rwandan Tribunals were not helpful in establishing specific sentencing guidelines for the proposed ICC. The did, however, espouse general sentencing principles, including a resistance against capital punishment.” *Id.*

⁵⁹ As indicated in the text, *supra*, each of the Nuremberg defendants was sent to the renowned Spandau prison in West Berlin. See TAYLOR, *supra* note 39, at 615. Similarly, the Tokyo defendants all served their respective sentences under the watchful eye of the U.S. Eighth Army at Sugamo Prison in Tokyo. See MINEAR, *supra* note 39, at 174. It was not until the end of the Allied Occupation in 1952 that the Japanese Government was given limited authority over the Tokyo prisoners. *Id.*

⁶⁰ See TAYLOR, *supra* note 39, at 615. “With the arrival of the prisoners [at Spandau] it became an international penitentiary, ultimately under the Control Council, but administered in monthly sequence by Russian, American, British and French military officers.”

⁶¹ See GINN, *supra* note 2, at 1-11.

enforcement of the sentences.

In contrast to the World War II bodies, the enforcement of ICTY and ICTR sentences will be governed continuously by both the Tribunal and the host State wherein the prisoner is ultimately incarcerated.⁶² This nuance will likely cause difficulty at a later point when the two *ad hoc* bodies disband. No provision currently exists in either Statute indicating who or what institution will oversee the enforcement of sentences once the Tribunals complete their work.⁶³

Article 27 of the ICTY Statute provides that "[i]mprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, *subject to the supervision of the International Tribunal*."⁶⁴ Article 27 is complemented by Rule 103 of the Tribunal which provides as follows: "[i]mprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons."⁶⁵

The only distinction between Article 27 of the ICTY Statute and Article 26 of the ICTR Statute is that the Rwandan Tribunal and accompanying Statute explicitly permits the domestic enforcement of sentences within Rwanda.⁶⁶ This provision leads to a curious result.

⁶² See ICTY Statute, *supra* note 5, at art. 27; see also ICTR Statute, *supra* note 14.

⁶³ See ICTY Statute, *supra* note 5, at art. 27; see also ICTR Statute, *supra* note 14, at art. 26.

⁶⁴ See ICTY Statute, *supra* note 5, at art. 27 (emphasis added).

⁶⁵ See *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Oct. 6, 1995, U.N. Doc. IT/32 Rev. 6.

⁶⁶ ICTR Statute art. 26 provides as follows:

Enforcement of Sentences

Imprisonment shall be served *in Rwanda or* any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Unlike the territories of the former Yugoslavia, the Rwandan justice system was wholly destroyed during the genocide campaign. The few prisons that exist in Rwanda are overflowing with domestic prisoners accused of committing or otherwise participating in genocide.⁶⁷ Whereas the Yugoslavian prisons most likely present a theoretical barrier to domestic imprisonment, the Rwandan prisons present legitimate practical obstacles to domestic imprisonment.⁶⁸ And, to the extent that the Secretary-General had concerns relating to the Yugoslavian situation, those same concerns would certainly exist in relation to the Rwanda. One would suspect that this provision is merely part of a program of political appeasement to the Rwandan government who, ironically, cast the only negative vote on the Security Council against the creation of the ICTR.⁶⁹

The provisions relating to imprisonment by "willing states" will invariably lead to distinctions in treatment between ICTY and ICTR prisoners depending on the host country that accepts the prisoner. For example, prison life in Sweden or Norway is most likely preferable to prison life in the United States or many of the African and Middle-Eastern countries.⁷⁰ This is true not only because the

ICTR Statute, *supra* note 14, at art. 26.

⁶⁷ See Morris, *supra* note 31, at 357. Due to internal conditions in Rwanda, it is difficult to discern the precise number of individuals being held domestically on charges of genocide and complicity in genocide. Professor Morris observes the breadth of this problem by discussing the "enormous problem" Rwanda must face domestically "of how to handle the other 90,000-plus criminal cases arising from the Rwandan genocide." See *id.*

⁶⁸ Cf. Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal For Rwanda*, 7 DUKE J. COMP. & INT'L L. 325 (1997). Akhavan observes that "[w]ith its very limited resources, the International Tribunal cannot even attempt to replace the role of Rwandan national courts in delivering fair trials to the approximately 85,000 persons presently detained. . . . [I]t is only the Rwandan courts that can attempt to deliver justice to the tens of thousands languishing in overcrowded prisons." See *id.* at 339.

⁶⁹ See Penrose, *supra* note 36.

⁷⁰ Circumstantial evidence regarding the distinctions between prison life in these world regions can be garnered from Amnesty International's 1999 World Report available at the Amnesty International website, <http://www.amnesty.org/ailib/aireport/ar99/index.html>. While there are numerous entries for Middle Eastern and African countries, there are no entries for Iceland or Norway and only minor complaints raised against Finland, Denmark and Sweden. In contrast, see generally the reports involving Pakistan, Turkey, Iran and Iraq. *Id.* Also of interest is the harsh criticism levied against

European and Scandinavian countries maintain much more liberal sentencing and detention practices, but also because the parole and commutation laws in these countries are more generous than their non-European counterparts — including the United States.⁷¹

A second consideration should be the ease of travel and access for the friends, relatives and counsel of each imprisoned individual.⁷² The Tribunals should consider the difficulty that prisoners will have in contacting and maintaining communications between themselves and those persons most capable of proffering them assistance. And, in the case of counsel, the Tribunal must consider the difficulty in accessing the prisoner once he or she is sent to a distant land. From a practical perspective, ease of access across Europe is very different from the burden of traveling across and throughout Africa. Considerations of access and difficulty in reaching a particular inmate cannot (and should not) be underscored — particularly from a human rights perspective.

Morris and Scharf observe that because the sentences imposed by the ICTY are to be served in the facilities of States outside the former Yugoslavia, “[t]here may be hardships when a person convicted of a crime is required to serve his sentence in a foreign country resulting from linguistic differences, cultural differences, or less frequent family visitation due to distance.”⁷³ To account for this dilemma, the solution proffered is that certain factors should be considered before determining where a particular ICTY prisoner is sent for incarceration.⁷⁴

Factors that should be considered include “the proximity of a State to the former Yugoslavia, the unquestionable neutrality of a State with regard to the Yugoslav conflict, the necessary security

United States’ prisons. *Id.*

⁷¹ See *infra* notes 121-124 and accompanying text.

⁷² William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461, 494 (1997) (acknowledging that international prisoners will “be isolated from their families and probably from other support systems. They may find themselves in relative isolation, in a culturally unfamiliar environment, and unable to communicate and socialize with fellow inmates and prison personnel.”).

⁷³ MORRIS & SCHARF, *supra* note 24, at 304.

⁷⁴ *Id.*

arrangements, international standards regarding the treatment of prisoners, the possibility of pardon or commutation under national law, the cost of incarceration in a State and the ability of a State to bear such cost.”⁷⁵ Although these factors were annunciated before the ICTY or ICTR had tried or convicted *any* defendant, they remain viable considerations when imposing and enforcing an international criminal sentence. With the hopeful advent of a permanent international institution in the ICC, these consideration must be more fully explored, considered and ultimately, precisely defined.

In addition to those factors set forth by Morris and Scharf, the following concerns should also be evaluated in determining the placement of international prisoners under the current system: past human rights abuses by the receiving State, ease of access to State prisons by the International Community or a representative thereof (such as the International Committee of the Red Cross), ease of access for counsel, family and friends, the immigration laws of the host State to the extent such laws affect family relations and visitations, the political stability of the receiving State, and, common languages (if any) of the host State and prisoner.⁷⁶

The ICTY Trial Chamber articulated concerns of its own regarding sentencing and imprisonment in the Erdemovic case. In the first Sentencing Judgment, the Court noted that “because persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which [such prisoners] will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees.”⁷⁷ The Erdemovic decision clearly requires that accepting States be signatories to the major human rights treaties, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the European Convention on Human Rights, and the Universal Declaration of Human Rights.⁷⁸ Additional considerations included

⁷⁵ *Id.* at 305.

⁷⁶ Many of the people of the former Yugoslavia share a common language, Serbo-Croatian. SCHARF, *supra* note 37, at 21. In contrast, the main regional language for ICTR defendants is reported to be Kinyarwanda. Akhaven, *supra* note 68, at 342.

⁷⁷ First Judgement, *supra* note 7, at para. 75.

⁷⁸ *Id.* at para. 74.

concern for human rights through adherence to the United Nations Standard Minimum Rules for the Treatment of Prisoners and numerous regional instruments relating to protective rules for persons under any form of detention or imprisonment.⁷⁹

To date, the dilemma regarding enforcement of sentences has focused less on the practical arrangements relating conditions of confinement and more on the problems relating simply to securing agreements from willing States to host ICTY and ICTR prisoners. The Honorable Gabrielle Kirk McDonald recently called for support from the international community while delivering a speech at American University in Washington, D.C.⁸⁰ Judge McDonald explained that "the nature of the modern State and its place in the international community means that it is the States who are expected, in fact required, to provide the structured and systematic support necessary to sustain the Tribunal."⁸¹ More specifically, Judge McDonald spoke to the urgent issue of detention as follows:

The second type of cooperation required, and one that is currently the most pressing, concerns the enforcement of sentences imposed by the Tribunal. A further consequence of our lack of territory is the absence of a facility for the incarceration of persons convicted by the Tribunal. We have no prisons. Under Article 27 of our statute, States may express a willingness to accept persons who have been convicted. The legal character of the Tribunal and the national penal systems is such that it is necessary to regulate the imprisonment process through enforcement agreements concluded between the Tribunal and the State concerned. The urgency of this matter, that is the need for enforcement agreements, is best illustrated by a few figures. As I have stated, we

⁷⁹ *Id.* at para. 74.

⁸⁰ Judge McDonald joined many other notable International scholars and jurists at a conference entitled, *War Crimes Tribunals: The Record and the Prospects*. The conference took place at American University on March 31 and April 1, 1998.

⁸¹ The Honorable Gabrielle Kirk McDonald, *The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT'L L. REV. 1413, 1426 (1998).

have twenty-three indictees in custody. Over the coming months, and years, we will complete their trials and appeals and may then face a situation where we have more convicted persons than there are States that have agreed to enforce their prison sentences. As we expect to obtain custody of more accused persons, this deficiency will become even more critical.⁸²

Despite this plea by the former President of the ICTY, there remain only four willing States (Italy, Finland, Norway and, most recently, Sweden) that have officially agreed to accept ICTY prisoners.⁸³ In comparison, only two African States (Mali and Benin) have agreed to accept ICTR defendants upon conviction.⁸⁴ Curiously, all of the ICTY-aligned States are concentrated in the Western European region while the ICTR States are confined to the African continent. Of these six “willing states,” only one of them, Norway, has actually received a prisoner. In August, 1998, Drazen Erdemovic

⁸² *Id.* at 1426-27. The more recent figures quoted *supra* in this Article indicate that twenty-five public indictments have been issued by the Court implicating sixty-six individual defendants and resulting in the arrest and detention of forty individuals. See sources cited *supra* notes 16-18.

⁸³ The 1997 Official Report of the ICTY indicates that ten States have “indicated their willingness” to enforce sentences of the Tribunal. These States include Bosnia and Herzegovina, Croatia, Denmark, Finland, Germany, the Islamic Republic of Iran, Italy, Norway, Pakistan and Sweden. In addition to those offering support, ten other States have indicated that they are *unable* to accept prisoners from the ICTY. The unavailable States are the Bahamas, Belarus, Belize, Burkina Faso, Ecuador, France, Liechtenstein, Malaysia, Poland and Slovenia. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. General Assembly, 52d Sess., Agenda Item 49, at Part IIIV, U.N. doc. A/52/375 (1997). Several States, however, have expressed their agreement to receive prisoners only with reservations. See *War Criminal Jailed Over Massacre*, LONDON EVENING STANDARD, Nov. 29, 1996, at 17 (indicating that Denmark, Germany, the Netherlands, Spain and Sweden have all agreed to take ICTY prisoners “with reservations”). Finland has stated that it will not accept political leaders or high-ranking officials who might require extraordinary security. See *Finland Ready to Receive Yugoslavia War Criminals*, REUTERS WORLD SERVICE, May 9, 1997. Sweden has indicated that it will only accept ICTY prisoners who are Swedish citizens or long-standing Swedish residents. See *Finnish Prisoners to Take in Five Convicted War Criminals*, AGENCE FRANCE PRESS, April 24, 1996.

⁸⁴ See generally ICTR website (visited Feb. 14, 2000) <<http://www.ictor.org>>. This information can be gleaned from the ICTR fact sheet, which is updated regularly.

was transferred to Norway to begin serving his five (5) year sentence.⁸⁵

III. WILLING STATES

Due to the structure of the ICTY and ICTR, both institutions must rely on “willing states” to assist in the enforcement of criminal sentences.⁸⁶ The United Nations does not maintain any permanent or international prison facility. Rather, the task of actual enforcement of ICTY and ICTR sentences is delegated to individual countries that may have no nexus to or interest in the underlying hostilities that served to create these juridical bodies.⁸⁷

In over six years of independent operation, the two ad hoc bodies have been notably unsuccessful in securing “willing states” to host ICTY and ICTR prisoners.⁸⁸ Currently, as noted above, there is a clear regional (or perhaps cultural) demarcation between the “willing states” of Western Europe and those of Africa. Yet, despite the futility experienced by these modern Tribunals, the ICC has similarly relegated the task of enforcing sentences to “willing states.”

Article 103 of the Rome Statute states that “[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court *their willingness* to accept sentenced persons.”⁸⁹ The Rome Statute does appear, however, to at least anticipate shortcomings similar to those evidenced by the ICTY and ICTR as Article 103 further provides that “[i]f no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.”⁹⁰

As the ICC becomes more than merely an intellectual exercise

⁸⁵ See generally ICTY website (visited Feb. 14, 2000) <<http://www.un.icty.org>>.

⁸⁶ See *supra* notes 64-66 and accompanying text.

⁸⁷ See ICTY Statute, *supra* note 5, at art. 27. See also ICTR Statute, *supra* note 14, art. 26.

⁸⁸ See *supra* notes 80-84 and accompanying text.

⁸⁹ Rome Statute, *supra* note 15, at Part 10, art. 103(1)(a) (emphasis added).

⁹⁰ *Id.* at Part 10, art. 103(4). The host State for the ICC has been designated as The Hague, Netherlands. *Id.* at Part 1, art. 3.

and a distant panacea,⁹¹ it is imperative that we move beyond the concept of "willing states." To date, this system has proven wholly ineffective.⁹² And, while it may not be possible at this point to rewrite or redraft the ICC Statute, it is possible to place increasing pressure on States to assist with the enforcement of international criminal law. The United Nations Security Council certainly possesses the ability to enforce sanctions against recalcitrant States when provided with sufficient motivation to act. A truly international system of criminal law cannot be dependent on a few select countries to carry out its mandate.⁹³ Rather, the willingness of States to cooperate with the existing Tribunals and the forthcoming ICC *must* develop in a more tangible measure. The status quo is simply unacceptable.

IV. ITALY, FINLAND, NORWAY, SWEDEN, MALI AND BENIN

Italy was the first State to reach agreement with the ICTY regarding the enforcement of ICTY sentences.⁹⁴ On February 6, 1997, nearly four years after the creation of the Tribunal, Italy signed an agreement with the Tribunal affirming its availability and cooperation under Article 27.⁹⁵ This agreement seemed particularly welcoming based in part on the proximity of Italy to the Balkan region.

⁹¹ As of February 7, 2000, ninety-four States have become signatories to the ICC. See Lawyers Committee for Human Rights' website (visited Feb. 28, 2000) <<http://www.LCHR.org/feature/50thsigs.htm>>. More importantly, however, only five States have thus far ratified the Rome Statute. *Id.* This number falls well short of the necessary sixty ratifications required for the ICC to come into full operation. See Rome Statute, *supra* note 15, at Part 13, art. 126. The States that have thus far ratified the Rome Statute include: Senegal (Feb. 2, 1999); Trinidad and Tobago (April 6, 1999); San Marino (May 13, 1999); Italy (July 26, 1999); and Fiji (Nov. 29, 1999).

⁹² Leila Sadat Waxler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L. J. 665, 707 (1996).

⁹³ Cf. Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 256 (1998) (stating that "the decision to try offenders domestically, hand them over to an international tribunal, or achieve some other form of accountability remains with the elites of nation-states, many of whose commitment to human rights does not now, and may not in the foreseeable future, extend to seeing themselves or their colleagues placed in the dock.").

⁹⁴ JONES, *supra* note 9, at 115.

⁹⁵ *Id.*

Permitting prisoners to be incarcerated in Italy would certainly ease the distance dilemma for counsel, families and supporters separated from ICTY prisoners.

Thereafter, Finland penned its agreement with the Court on May 7, 1997.⁹⁶ Neither of these agreements apply automatically.⁹⁷ Rather, the Court will determine the place of ultimate detention based on a case-by-case basis. It appears that beyond these initial agreements, both nations must still submit an official request or reach further agreement with the Court confirming that *a particular defendant* is welcome for detention in their State.⁹⁸ Such limited agreements do not provide the ICTY with much actual assistance as particular defendants may not be desired by *any State*.⁹⁹ This flaw was noted by Judge McDonald who criticized that “[i]f we do not have enforcement of sentence agreements with States, we can do nothing with the persons if they are convicted. Nothing. As I have twenty-three persons in custody and expect . . . that we will have more That is all fine and well. What do we do if they are convicted?”¹⁰⁰

Perhaps responding to the urgent need for “willing states,” both Norway and Sweden have also agreed to accept Yugoslavian prisoners.¹⁰¹ Thus, the ICTY may now select between four States when deciding the locus of final detention.¹⁰² Interestingly, each of the four countries remain confined to the Western European region. One must question why more States — European, or otherwise — have not yet indicated a willingness to accept ICTY and ICTR prisoners. Do the North American countries feel that their participation via contributing funds and court personnel (including

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (stating that “[t]he Agreement does not apply automatically, however, but only if Italy agrees to a request from the Registrar that a particular convict be sent to Italy to serve his sentence. . . . Like the Agreement with Italy, the Agreement with Finland does not apply automatically but on a case-by-case basis, following consultations between the Parties concerning a specific convicted person.”).

⁹⁹ See *supra* note 11 for a discussion of the reservations by various States.

¹⁰⁰ McDonald, *supra* note 81, at 1436.

¹⁰¹ See generally *supra* note 83.

¹⁰² *Id.*

judges, prosecutors and defense counsel) absolves them from further contribution? Is such cooperation sufficient to dispel their burden under the ICTY and ICTR Statutes? And, where are the Latin American countries, Australia and the Asian countries?

The globalization of criminal law *requires* that the international community in its many varieties forge together to produce a justice system capable of redressing gross violations of human rights. A court without complementary bodies, such as a police unit and prison facilities, to carry out its pronouncements becomes little more than a symbolic gesture.¹⁰³ Certainly the legacy of World War II and its promise of "never again," the victims of the Balkan tragedies and the Rwandan genocide victims are deserving of more.

Yet, even the African countries have been reluctant to proffer the necessary assistance. Only two countries, both located on the Western Coast of Africa thousands of miles from Rwanda and the Tribunal, have agreed to accept ICTR prisoners.¹⁰⁴ Whatever concerns regarding proximity to counsel, family and friends and ease of access exist in relation to the ICTY States are magnified on the African continent. Travel from Rwanda to the Tribunal in Tanzania is prohibitively problematic for many individuals. Now, prisoners will be exported to a distant portion of the continent without the benefit of sophisticated and frequent travel options. The lack of any structured response to this continuing void will hamper the evolution of any ICC; much like it has burdened and crippled the two ad hoc bodies.¹⁰⁵

Whatever explanation might be accepted or acceptable at this stage of international legal development, the continued inertia of United Nations Member States merely mocks the pledge of peace and

¹⁰³ Ratner, *supra* note 93, at 256. See also Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713 (1997).

¹⁰⁴ See ICTR Website, *supra* note 84.

¹⁰⁵ Cf. William A. Schabas, *Prosecuting International Criminal Justice, Democracy and Impunity in Post Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523 (1996); Akhavan, *supra* note 68, at 332; Richard Goldstone, *Assessing the Work of the United Nations War Crimes Tribunals*, 33 STAN. J. INT'L L. 1, 5 (1997) (describing the ICTY as "a fig leaf for the international community behind which it could hide its shame for having done so little for the people of the former Yugoslavia.").

reconciliation to these war-torn countries. While only four Western European and two West African States have agreed to accept international prisoners, an obvious contrast can be drawn between this level of cooperation mandated by Security Resolution and the level of cooperation and zeal evidenced by those States eager to participate in the prosecution and detention of former Chilean General Augusto Pinochet.¹⁰⁶ While none of the current ICTY defendants maintain the political stature or historical significance of Pinochet, the lack of commitment to finally bringing these individuals to justice speaks volumes about the international community's true devotion to the principle of accountability for gross violations of human rights. The conspicuous lack of coherent and reliable follow-through in international criminal law remains a plague that promotes and reinforces impunity.

V. PAROLE AND COMMUTATION ISSUES

Another crucial element of criminal justice that has thus far been overlooked in international jurisprudence is the importance of parole and commutation issues as a principle of sentencing. Of all the Major War Criminals — both at Nuremberg and Tokyo — only one came close to fully serving his sentence.¹⁰⁷ Many of the remaining defendants avoided fulfilling their sentence obligations due to the disbanding of the ad hoc Tribunals and the ambivalence that followed the initial reaction to their convictions.¹⁰⁸

This failure (to the extent that massive reduction of sentences and whole-scale parole policies constitutes a failure of criminal justice) is memorialized in the halls of the Holocaust Museum in

¹⁰⁶ See generally BBC website (visited Feb. 15, 2000) <<http://www.bbc.co.uk>>.

¹⁰⁷ Rudolph Hess died in prison at the age of ninety-three (93) when he committed suicide. This is the only Major War Criminal emanating from either World War II tribunal that fully served a sentence of life imprisonment. See *supra* notes 53-57 and accompanying text. The entire group of Tokyo prisoners, both Major War Criminals and the lesser Class B and Class C defendants, were all released well prior to expiration of their respective sentences. GINN, *supra* note 2, at 242.

¹⁰⁸ See *supra* notes 53-57 and accompanying text.

Washington, D.C.. Visitors here are informed that most of the individuals responsible for the unspeakable travesties committed during World War II, particularly by German defendants, were released prior to the expiration of their actual sentences. The statement, as it appears, strongly condemns the unsatisfactory methods used to effectuate widespread parole and commutation of sentences following World War II.

Because the law of the detaining State will apply to both issues of detention and issues regarding parole and commutation of sentences,¹⁰⁹ it is vitally important for the modern Tribunals to consider the question of pardon and commutation of sentences in establishing a uniform system of detention. Commutation adds yet one more concern for these Tribunals and the forthcoming ICC in achieving their stated goals of putting “an end to impunity for the perpetrators of these [international] crimes and thus contribute to the prevention of such crimes.”¹¹⁰

¹⁰⁹ See *infra* notes 111-117 and accompanying text.

¹¹⁰ Rome Statute, *supra* note 15, at Preamble. This quote is taken directly from the Preamble of the Rome Statute which reads in its entirety as follows:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States should

Article 28 of the ICTY Statute provides that “[i]f, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned *shall* notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, *shall* decide the matter on the basis of the interests of justice and the general principles of law.”¹¹¹ The dependency of this Article and Article 27 of the ICTR Statute¹¹² on State law as opposed to any internationally agreed upon approach to parole and commutation may lead to inconsistent and varied results.

refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction,

Resolved to guarantee lasting respect for the enforcement of international justice . . .

Id.

¹¹¹ ICTY Statute, *supra* note 5, at art. 28 (emphasis added).

¹¹² The language of Article 27 of the ICTR Statute is essentially identical to that of Article 28 of the ICTY Statute. Article 27 provides as follows:

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

ICTR Statute, *supra* note 14, at art. 27.

For instance, individuals incarcerated in a federal prison facility in the United States (were the United States to act as a “willing state” for receiving international prisoners) would be wholly without resort to parole as parole is no longer available to federal prisoners in the United States. As Morris and Scharf note, “[t]his approach could result in unequal treatment of persons convicted by the International Tribunal since eligibility for pardon or commutation depends on the national law of the State where the person is incarcerated. National laws may vary in this respect.”¹¹³

The corresponding ICTY Rules regarding pardon and commutation of sentence can be found in Rules 123, 124 and 125 of the Rules of Procedure and Evidence.¹¹⁴ Rule 123 provides that “[i]f, according to the law of the State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State shall in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.”¹¹⁵ Rule 124 gives the President of the ICTY the power to “determine, in consultation with the Judges, whether pardon or commutation is appropriate.”¹¹⁶ And finally, Rule 125 provides that “[i]n determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.”¹¹⁷

These rules, erroneously I would suggest, place undue importance on Tribunal judges in the continuing oversight of parole matters. Both the ICTY and ICTR remain ad hoc institutions with a limited mandate, limited resources, and a limited temporal

¹¹³ MORRIS & SCHARF, *supra* note 24, at 306-07.

¹¹⁴ The corresponding ICTR Rules of Procedure and Evidence are found at Rules 124, 125 and 126, respectively. International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.1 (1995) (*entered into force* June 29, 1995).

¹¹⁵ *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Oct. 6, 1995, U.N. Doc. IT/32 Rev. 6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

existence.¹¹⁸ The respective Statutes and Rules of Procedure and Evidence have not yet envisioned an alternative approach to reliance on the Tribunal judges despite the issuance of three life sentences by the ICTR¹¹⁹ and three sentences exceeding twenty years at the ICTY.¹²⁰ All of these lengthy sentences and the many that are to follow, will surely outlast the existence of these temporary institutions. An immediate need would appear to be the rectification of this dangling problem. Otherwise, the opportunity for history to repeat itself via the mass expulsion of war criminals looms ominously on the not too distant horizon.

One possible solution to the parole and commutation issue would be for the ICTY and ICTR to immediately establish uniform guidelines for commutation beyond those stated in Rule 125 of the ICTY Rules of Procedure and Rule 126 of the ICTR Rules of Procedure prior to this issue reaching either Tribunal.¹²¹ These juridical bodies should strive to avoid the appearance that pardon and commutation are dependant upon the fortuitous location where a person is ultimately incarcerated by issuing more specific criteria for parole and commutation of sentences. In this regard, it might be useful for the Court to analyze the separate commutation statutes of three of the accepted ICTY States — Italy, Finland and Norway.

Each of these States provides the availability of commutation of sentence. Finland and Norway provide very generous commutation provisions, permitting parole to occur after an offender has served two-thirds of his or her sentence.¹²² For first time offenders in both

¹¹⁸ While neither Tribunal Statute delimits an established time frame for their respective existence, the stated purposes for both institutions is limited to the particular crises which they address. The ICTR jurisdictional mandate is limited to one year — including those violations occurring between 1 January 1994 and 31 December 1994. *See generally* ICTR Statute, *supra* note 14, at art. 7 (detailing the territorial and temporal jurisdiction of the Tribunal).

¹¹⁹ *See generally supra* note 21.

¹²⁰ *See generally supra* note 6.

¹²¹ *But see* MORRIS & SCHARF, *supra* note 24, at 306-07 (suggesting that “the responsibility entrusted to the International Tribunal to make the final decision as to pardon or commutation guarantees the necessary uniformity of treatment”).

¹²² Prisoners in Finland are normally granted automatic parole once they complete two-thirds of their sentence. *See* Matt Joutsen, *Finland*, in UNITED STATES DEP’T OF JUST., WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1997) *available at* (visited February 29, 2000) <<http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjfin.txt>>.

Finland and Norway, however, the necessary prison time is generally reduced to half the imposed sentence.¹²³ In contrast, Italy provides that if an offender participates in a re-education program, he or she may receive forty-five days credit for each six month period spent in prison.¹²⁴ This system allows a fifteen month reduction in sentence for each five years served.¹²⁵ Because Erdemovic has been sent to Norway after having served more than two years on a five-year sentence, the issue of commutation should appear before the Court within the coming year.

This author recommends the establishment of a uniform parole and commutation structure that further delineates the requirements set forth in ICTY Rule 125. Beyond the factors already announced, the Court should establish a scheduled minimum time period before which commutation is not available.¹²⁶ Recognizing that a variety of domestic approaches exist, the Court should establish a rule permitting the parole or commutation of sentences after *at least* two thirds of the announced sentence has been served provided the prisoner meets certain additional criteria.¹²⁷

Likewise, most Norwegian prisoners are released prior to the expiration of their full sentence. Most prisoners are released after serving two-thirds of their sentence. See Lee Bygrave, *Norway*, in UNITED STATES DEP'T OF JUST., WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1997) available at (visited February 29, 2000) <<http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnor.txt>>.

¹²³ See sources cited *supra* note 122.

¹²⁴ See Mario Biddau & Pietro Marongiu, *Italy*, in UNITED STATES DEP'T OF JUST., WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS 25 (1997) available at (visited February 29, 2000) <<http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjita.txt>>.

¹²⁵ *Id.*

¹²⁶ Interestingly, this is precisely what the Tribunal did in the case of Tadic. The original Sentencing Judgment in the Tadic case explicitly provided that parole or commutation would be unavailable to Tadic until he had served a full ten (10) years of his sentence. At the time this judgment was issued, that would have required Tadic to fully serve one half of his sentence prior to any consideration of parole. This method, if continued, will ensure some level of consistency between sentences despite the fortuitous location of imprisonment. Unfortunately, however, the remaining ICTY judgments do not contain such explicit language relating to parole and commutation. The purpose of establishing norms would be precisely to avoid the ad hoc nature and treatment of this crucial issue.

¹²⁷ This recommendation fully comports with the procedure detailed in Article 110 of the Rome Statute. Article 110 provides in pertinent part as follows: "When the person has served two thirds of the sentence, or 25 years in the case of life

In addition to standard temporal limitations, additional parole considerations should be explored. First, the future dangerousness of the individual should be assessed in every case. This issue of future dangerousness is of particular importance in the case of Yugoslavia and the ICTY since the Balkan war remains ongoing and atrocities continue to be committed by the warring factions. A second consideration should be whether the individual has accepted his or her respective involvement and guilt, demonstrated remorse and shown a willingness to contribute to society in a more positive fashion upon release. Such criteria would assist in the determination of whether a sentence once announced has proved effective at assisting in the restoration and maintenance of peace, the initial impetus for the ICTY and ICTR. As the Tribunal judges are much more intimately involved with these issues on a daily basis, the Honorable Judges are in a far superior position than the receiving State to assess the achieved goals of sentencing. Accordingly, the issue should not be relegated to State control but should in all respects be addressed by the Tribunals in a fair and consistent manner.

This emphasis on judicial rather than State control conflicts with the earlier criticism that the Tribunals have not yet evinced acknowledgment that these institutions remain merely temporary judicial bodies. It is at this point that the actual creation of the ICC becomes pertinent. If the ICC does come into full existence, the judges of the existing ad hoc bodies could easily relegate the task of overseeing sentences to this permanent international institution.¹²⁸ This author may be unique in suggesting that the ICC is important for the potential role it can play in enforcing and overseeing ICTY and ICTR sentences, but as history demonstrates, reliance on other nations to deal with war criminals results in full scale pardons and imperfect

imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time." See Rome Statute, *supra* note 15, at Part 10, art. 110 (3). As the language of this provision clearly indicates, the two-thirds review is mandatory. Review must occur after two-thirds of the sentence has been served and cannot be considered prior to the expiration of that time. *Id.*

¹²⁸ See *Id.* Article 110 unequivocally delegates the task of reviewing sentences to the judge of the Court. *Id.* Hence, absorbing the overflow of the ICTY and ICTR prisoners once the two Tribunals disband will be less burdensome than calling upon some outside institution or agency. Once the ICC does enter into force, these judges will become the leading experts in enforcing international criminal law.

justice.¹²⁹

Fortunately, the ICC Statute recognizes the potential for the disparate enforcement of sentences and accordingly concentrates the sole power of reducing any sentence with the Court. Article 110 of the ICC Statute clearly states that “[t]he *Court alone* shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.”¹³⁰ In addition, in an effort to avoid instances, such as the United States example considered above where parole is not a State-provided option, the Statute mandates that the Court shall review individual sentences for possible reduction after “the person has served two thirds of the sentence, or 25 years in the case of life imprisonment.”¹³¹ This ability to reconsider individual sentences prior to expiration fully comports with the International Covenant on Civil and Political Rights emphasis on the prison as a place for rehabilitation.¹³²

VI. AN INTERNATIONAL PRISON

Judge McDonald, the former President of the ICTY, has expressed grave concern regarding the recalcitrance of individual States to offer prison facilities under Article 27 of the ICTY Statute. As she recently noted, “[o]nly six States have commenced negotiations to reach agreements for the enforcement of sentences and of those, only [three] have signed agreements, while a further thirteen States have indicated they are willing to accept convicted persons The Tribunal has the right to expect more than this dismal demonstration of support by the vast majority of the international community. The expectation that we will be supported and empowered by the international community has practical, legal and moral underpinnings.”¹³³

¹²⁹ See *supra* notes 53-57 and accompanying text.

¹³⁰ Rome Statute, *supra* note 15, at Part 10, art. 110(2) (emphasis added).

¹³¹ *Id.*

¹³² International Covenant on Civil and Political Rights, Dec. 16, 1966, 1999 U.N.T.S. 171.

¹³³ McDonald, *supra* note 81, at 1432-33.

Perhaps the solution to this dilemma of detention *is* as simple as Spandau or Sugamo.¹³⁴ It is this author's belief that the international community should create an international prison wherein supervision, maintenance and financial responsibility are shared by the entire international community. With the increasing global awareness of human rights and the growing support for the ICTY and ICTR, as embodied by the recent adoption of an ICC Statute and the arrest and detention of former Chilean General Augusto Pinochet, the time is ripe for international cooperation regarding imprisonment of war criminals. To date, the requested cooperation has not been forthcoming, despite repeated pleas by the Tribunal and Secretary-General for assistance. The international community needs some catalyst to spark its interest in funding and facilitating the imprisonment of war criminals. The Pinochet dilemma may well provide the appropriate European vehicle.

Although many European States have been reluctant to become involved in the task of incarcerating ICTY and ICTR prisoners, the fervent support demonstrated over the mere possibility of trying General Pinochet indicates more than a passing interest in rectifying gross violations of human rights.¹³⁵ Perhaps the Yugoslavian conflict is simply "too European" or the currently detained individuals less renowned than General Pinochet. Whatever the reason, stated or implicit, the fact remains that Spain, Great Britain and other European powers have yet to act with such outrage against ICTY and ICTR defendants. But, too, this may have something to do with the fact that, as of the time of this writing, General Pinochet remains under house arrest and has not actually required maintenance in a British prison facility. It is hard to understand the intricate reasons underlying the virulent response to the Pinochet episode. Nonetheless, Europe is moving (at least in this one example) in the direction of enforcing international criminal law. And, without proper enforcement mechanisms, the continued indictment, arrest and trials of ICTY and ICTR defendants conflicts with the international community's stated belief that impunity must cease.

To meet the growing need for enforcement in international

¹³⁴ See *supra* notes 59-61 and accompanying text.

¹³⁵ See generally *supra* note 106 and accompanying text.

criminal law, we should investigate the feasibility of establishing an international prison system whereby the international community participates in detention either directly through providing physical resources (such as the prison facilities offered by Italy, Finland, Norway, Sweden, Mali and Benin), labor forces (such as guards, interpreters, educators, medical personnel and other necessary employees), or indirectly by offering financial resources to successfully enable the Tribunals to fulfill their respective mandate. Such proposal conveys a certain level of optimism by this author as the need for a prison facility will become increasingly acute with the creation of a permanent ICC. The proximity of Italy to the Balkan conflict, and its willingness to accept at least certain prisoners, makes Italy a prime candidate for hosting at least one such facility.¹³⁶ Further, the ICTY has already accepted Italy as a potential host-State, thereby acknowledging its suitability to enforce international sentences.¹³⁷

While this proposal may seem premature, visionary or otherwise unpalatable, it has potential. More importantly, it has the authority of history. An international prison system could possess a single detention unit, such as Spandau or Sugamo, or maintain regional detention facilities with centralized staff and regulations. There are many nations (such as the United States) that maintain a national prison system with regional facilities. The advantage an international system offers is considerable. For instance, an international prison system would ensure: (1) that each international prisoner has a prison cell available upon conviction; (2) that prisoners would be housed with similar offenders posing similar security risks; (3) that prisoners would be subjected to standard rules and regulations regarding confinement, and, ultimately, a uniform system for commutation; and, (4) perhaps most importantly, that prisoners and the international community would perceive a sense of permanence.

The fifty-year gap between war crimes tribunals may be

¹³⁶ In addition, the recent ratification of the Rome Statute by Italy demonstrates its commitment to enforcing international criminal law. See *supra* note 91. Italy is the only major European country to have ratified the Rome Statute and/or to have agreed to accept ICTY prisoners. *Id.*

¹³⁷ See *supra* note 93 and accompanying text.

credited less to the absence of war crimes or conflicts rising to the level of international magnitude and more to the reality that trying war criminals remains a tedious and expensive task. The judicial machinery constructed by the United Nations Security Council has cost the world community millions of dollars. And, this expense does not even begin to reflect the cost of imprisonment for the numerous individuals that have been (and will be) convicted by the ICTY and ICTR and who will remain in criminal custody for many years to come. A permanent facility can help control costs and provide a place certain for incarcerating the next group of defendants emanating from the future equivalents to Cambodia, the Philippines, Iraq, Mozambique, Angola, Sierra Leon and Indonesia. The very point of an international criminal court is to establish a *permanent institution* capable of addressing gross violations of human rights.

Further, a single prison system requires familiarization with only one set of domestic (or internationally established) laws and regulations and should permit prisoners to be surrounded with others who speak their native language and understand their culture since most wars generate much more than an individual defendant.¹³⁸

Finally, and perhaps most importantly, is the consideration that a single prison system would make the transition to control by an outside source or agency much easier if the concentration of prisoners is focused in only one area or a small number of areas.¹³⁹ One should not lose sight of the fact that the ICTY and ICTR are simply ad hoc bodies. Both institutions are limited tribunals with a finite operating period. To spread these prisoners throughout the world with sentences ranging from five years to possible life imprisonment will require some organization or body to constantly familiarize itself with domestic laws in each of the host countries. The job of overseeing these universal prisoners will become terribly laborious once the two ad hoc Tribunals are dismantled. And, while the ICC might step into

¹³⁸ See *supra* notes 74-77 and accompanying text.

¹³⁹ MORRIS & SCHARF, *supra* note 24, at 308 (stating that "[a]fter the International Tribunal has completed its mandate with respect to the crimes committed in the former Yugoslavia, responsibility for making decisions as to pardon or commutation could be transferred to another international body, such as the European Court of Human Rights or a special committee of the United Nations Human Rights Commission. This is one of the questions that will need to be addressed at that time by the Security Council").

a supervisory role once this vision becomes a functioning reality, there is no assurance that the ICC will ever garner the necessary number of signatures for ratification. In over twenty months since the ICC Statute was adopted, only five States have ratified the document.¹⁴⁰ Fifty-five additional ratifications are required before we can begin relying on the ICC for any improvement in international law.¹⁴¹ To the extent an international prison system proves unworkable, the international community must begin considering alternative ways to secure the enforcement of sentences. The growing number of ICTY and ICTR convictions and the continued inertia of the international community under the current system mandates a change in approach. The future of international criminal law and the viability of the ICC may well depend on an appropriate solution being reached.

VII. THE DUTY TO PUNISH

Were international scholars and activists to be completely candid, we would proclaim that punishment, *not prosecution*, is a failed concept in international law. There are numerous treaties and covenants that require prosecution.¹⁴² One of the most classic and unequivocal examples can be found in the Genocide Convention, adopted by the international community in 1948 and entered into force in 1951.¹⁴³ The Genocide Convention mandates that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction."¹⁴⁴ Yet, there has still been

¹⁴⁰ See *supra* note 91.

¹⁴¹ Rome Statute, *supra* note 15, at Part 13, art. 126. Article 126 of the Rome Statute requires that sixty States ratify the Statute to bring the ICC into force.

¹⁴² See generally Mary M. Penrose, *Impunity: Inertia, Inaction and Invalidity, A Literature Review* (1999) (working paper completed for and on file with the Asia Foundation). Several of the cited conventions and treaties include: the Genocide Convention; the Convention against Torture; the International Covenant on Civil and Political Rights; the Geneva Conventions of 1949; and various regional instruments. *Id.*

¹⁴³ Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, 1951 A.T.S. 2 [hereinafter Genocide Convention].

¹⁴⁴ *Id.* at art. 6.

no action against any of the individuals responsible for the Cambodian genocide.¹⁴⁵ Rather, Cambodia stands today as one of the most conspicuous political failures of the post-World War II era.

Beyond the failures noted in Cambodia, one can point to the numerous instances in Latin America where persons responsible for gross violations of human rights were explicitly granted immunity or have been permitted to avoid prosecution due to the fragility of developing democracies.¹⁴⁶ In response to the wave of impunity experienced between 1960 and 1990, Professor Diane Orentlicher published a groundbreaking article entitled "Settling Accounts: The Duty to Prosecute."¹⁴⁷ This convincing article solidified the collective conscience of many international scholars in suggesting that there is an obligation — both legally and morally — to prosecute those individuals responsible for committing gross violations of human rights. Yet, despite the popularity of Professor Orentlicher's article and the frequent citation to this piece, there is noticeable inertia regarding the duty to *punish*.

The distinct treatment of the duty to prosecute and the duty to punish goes far beyond a matter of semantics.¹⁴⁸ The modern consensus seems to be that there is indeed a duty to prosecute. But, as this current article demonstrates, the level of agreement seems less obvious when dealing with the duty to punish. What value is

¹⁴⁵ See Penrose, *supra* note 142.

¹⁴⁶ See generally TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) (for a thorough and varied approach to the transitional choices made by various Latin American countries following their respective transitions to democracy).

¹⁴⁷ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

¹⁴⁸ Black's Law Dictionary provides the literal definitions for punishment and prosecution. The term "prosecute" is defined as follows: "[t]o follow up; to carry on an action or other judicial proceeding; to proceed against a person criminally. To 'prosecute' an action is not merely to commence it, but includes following it to an ultimate conclusion." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990). Similarly, "prosecution" is explained as "[a] criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime." *Id.* In subtle contrast, the term "punishment" is defined as "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." *Id.* at 1234.

prosecution when the issue of punishment remains unresolved? To create an international criminal court without the power to arrest or lacking the legitimate threat of imprisonment does little to quell international violence. A fundamental concept of criminology is that it is not the severity of punishment that deters, but rather, that the certainty of *some form* of punishment that precludes the commission of crime.¹⁴⁹

Despite the presence of two International Tribunals and the proclamation supporting a permanent international criminal court, there continues to be massive structured killings in several parts of the world. In fact, the clearest evidence of the impotency of these Tribunals to curb violence can be found in the former Yugoslavia itself where war defiantly continues.¹⁵⁰ The threat of prosecution is clearly less formidable than the threat of punishment.¹⁵¹ Punishment, as enforced in full measure by the international community, could truly avert such crises as those experienced in Rwanda and the former Yugoslavia.

Perhaps it is time for the international community to tackle a much graver problem than the duty to prosecute. Now that scholars and activists have reached an acceptable level of agreement regarding prosecution, perhaps it is time to start honestly considering the duty *to punish*. And, as set forth above, punishment will entail much greater cooperation than that which has thus far occurred. The duty to punish will require that the United Nations and its Member States pledge their continued support in creating an effective criminal justice

¹⁴⁹ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS 63 (Richard Bellamy ed., 1995) (reminding that "[t]he certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to hope of not being punished at all").

¹⁵⁰ *War with Milosevic*, THE ECONOMIST, April 3, 1999 (explaining that in April, 1999, figures regarding Kosovo indicated as many as one million refugees may have been displaced during the Serbian-led ethnic cleansing efforts of March and April, 1999). This overflow resulted in NATO bombings outside the purview (and without the sanction) of the United Nations Security Council. See Press Release, *Security Council Rejects Demand for Cessation of the use of Force Against Federal Republic of Yugoslavia*, (United Nations) SC/6659, 3989th mtg., March 26, 1999.

¹⁵¹ See Press Release, *supra* note 150 (describing that at one point, the refugees were pouring over the Albanian, Macedonian and Montenegro borders at a rate of 4,000 per hour). The mass exodus of Kosovar Albanians suggests that the ICTY has had little impact on at least certain areas of the Yugoslavian conflict.

system. The more than six year presence of two criminal tribunals has done little to quash international violence. A criminal court without a complementary police force and prison facility is simply inadequate. Such design falls well short of the perceived duty to punish and the proclaimed duty to prosecute. Punishment via criminal prosecutions requires dedication to all aspects of criminal justice.

At this point, punishment requires a collective commitment by the international community that those individuals convicted by our international criminal bodies will be placed in penal institutions capable of carrying out the pronounced sentences. The pledge of a mere six States cannot adequately reach this goal. Rather, let the duty to prosecute serve as the first exchange in a continuing conversation. Let us move beyond the mere duty to prosecute and venture further into the duty to punish.

CONCLUSION

Despite the predication by Professor Michael Scharf that proximity to the former Yugoslavia might be a basis for detention considerations, the first ICTY sentence will be served by Drazen Erdemovic in Norway.¹⁵² This decision is somewhat puzzling when one considers that Italy, one of the closest countries to the former Yugoslavia, was *the first country* to agree to accept ICTY prisoners.¹⁵³ One commentator suggests that Host States need to be determined prior to the rendering of any judgments so as to avoid the appearance of political judgments. As set forth above, however, the list of "willing states" is confined to four Western European and two West African countries.¹⁵⁴ This remains true despite the blossoming success of the ICTY and ICTR in bringing modern-day war criminals to justice. This remains true despite the recent adoption of the Rome Statute by a majority of the United Nations Member States.

Drazen Erdemovic. He is the first. He has served over three

¹⁵² See ICTY Website, *supra* note 85.

¹⁵³ See Ratner, *supra* note 93.

¹⁵⁴ Though four States currently exist for detention purposes, only three were available at the time Erdemovic's sentence was confirmed on appeal. See *supra* notes 10-13 and accompanying text.

years of his five-year sentence. Under the rules of Norway, he may be released at any time now — pending final approval from the ICTY judges. His case will be pivotal in establishing a precedent for the enforcement of international criminal sentences. For this reason, it is imperative that the ICTY, the ICTR and the UN work together to establish rules and procedures governing the possibility of a standard procedure on the commutation of individual sentences. The Court has perhaps erred in waiting this long — some six years following its inception — to address the unique and pressing issues of detention.

It is also time for the international community to offer its assistance under Chapter VII to maintain and/or restore peace to the former Yugoslavia and Rwanda by assisting the ICTY and ICTR, respectively, with the issue of detention. The current options are severely limited. “The issue, therefore, is not whether those in custody are convicted or acquitted. Instead, with respect to the indictments issued to date, there are currently no means for the enforcement of more than a small number of sentences. It is folly to defer action on this matter until such time as we are presented with a situation that we cannot address because of lack of incarceration facilities.”¹⁵⁵

Drazen Erdemovic. He is the first individual to be condemned by a modern war crimes tribunal. By no means will he be the last.¹⁵⁶ The time for determining detention issues is now. The legacy of international criminal law may well depend upon it. The authority of the ICC requires it. Complacency by “willing states” can no longer be ignored or accepted. We are definitely at the crossroads: is it merely that international law decrees a duty to prosecute or are we actually moving beyond this point toward a true duty to punish? At present, our actions belie our words.

¹⁵⁵ McDonald, *supra* note 81, at 1433.

¹⁵⁶ See *supra* notes 6-21 and accompanying text.

